Supreme Court, U.S.
FILED
JAN 25 1993
OFFICE OF THE CLERK

Nos. 92-848, 92-879

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT MCI COMMUNICATIONS CORPORATION

CHESTER T. KAMIN
MICHAEL H. SALSBURY *
ANTHONY C. EPSTEIN
DONALD B. VERRILLI, JR.
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	6
CONCLUSION	13

TABLE OF AUTHORITIES

Cases — Page

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) .. 11
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 10
Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989) 11
Buckley v. Valeo, 424 U.S. 1 (1973) 12
Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) 10
Morrison v. Olson, 487 U.S. 654 (1988) 12
Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 12
Rogers v. Lodge, 458 U.S. 613 (1982) 9
United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) 3, 9
United States v. Armour & Co., 402 U.S. 673 (1971) 8, 9
United States v. Atlantic Refining Co., 360 U.S. 19 (1959) 8, 9
United States v. Doe, 465 U.S. 605 (1984) 9
United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 8
United States v. Swift & Co., 286 U.S. 106 (1932) 3, 9, 11, 12
United States v. Western Elec. Co., 900 F.2d 283 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990) .. 4, 5, 6
United States v. Western Elec. Co., 907 F.2d 1205 (D.C. Cir. 1990) 6
Youakim v. Miller, 425 U.S. 231 (1976) 10

Statutes

S. Ct. Rule 29.1 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 92-848, 92-879

AMERITECH CORPORATION, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT MCI COMMUNICATIONS CORPORATION

Respondent MCI Communications Corporation [1] ("MCI") opposes the Petitions for Certiorari in Nos. 92-848 and 92-879.

Petitioners have advanced no persuasive argument for plenary review. They have identified no conflict with any

---

[1] MCI Communications Corporation provides long distance and information services through wholly owned subsidiaries. It has no parent company. *See* S. Ct. Rule 29.1.

decision of another federal court of appeals or state supreme court. They have identified no conflict with a prior decision of this Court. Nor have they identified any important legal principle of general application at stake in this case.

It is certainly true, as Petitioners contend, that the consent decree at issue—the 1982 Modification of Final Judgment ("MFJ")—is uniquely important. The MFJ broke up the Bell system and ushered in a new era of competition in telecommunications markets. The MFJ established "line-of-business" restrictions as structural remedies in the markets for long distance services, information services and manufacturing telecommunications equipment. The line-of-business restrictions protect these newly competitive markets from future abuse by the new owners of AT&T's former local telephone monopolies—the Bell Operating Companies ("BOCs"). Competitors in those markets are dependent on fair access to local telephone networks. By prohibiting the BOCs from participating in these access-dependent markets, the decree eliminated their incentive to abuse their control over the bottlenecks.

The overall importance of the decree does not, however, justify plenary review of the particular questions raised in the petitions for certiorari. The petitions raise extremely narrow, derivative issues that may well be mooted by the resolution of overarching issues of MFJ interpretation presented to this Court in the near future. *See* pages 6-7 *infra*. Moreover, as will be demonstrated, the district court and the court of appeals were plainly correct both in the standard of review they applied to the proposed decree modification at issue and in the result reached applying that standard. *See* pages 8-12 *infra*.

STATEMENT OF THE CASE

1. Questions of decree modification under the MFJ are not governed by traditional equitable principles generally applicable to consent decrees. *Cf. United States v. Swift & Co.*, 286 U.S. 106 (1932). The parties to the MFJ, including Petitioners, expressly agreed that requests to remove the "line of business" restrictions on the Bell Operating Companies should be governed by a different standard. The parties' mutual agreement is embodied in Section VIII(C) of the MFJ, which states:

> The restrictions imposed upon the separated BOCs by virtue of Section II(D) [which sets forth the line-of-business restrictions] shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

MFJ, § VIII(C); Appendix to Petition for Certiorari in No. 92-848 (Pet. App.) 75a. The district court insisted on the inclusion of Section VIII(C) to "remove any doubt about the appropriate test" for requested modifications of the line-of-business restrictions. *United States v. AT&T*, 552 F. Supp. 131, 194 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

2. On its face, Section VIII(C) plainly dictates application of the "no substantial possibility" standard to requests for modification of the line-of-business restrictions. Before this Court, Petitioners do not dispute that the BOCs' present request to provide interLATA common channel signalling would require removal of a line-of-business restriction in Section II(D) of the MFJ. Section II(D) bars interexchange telecommunications service by the BOCs, and the proposed common channel signalling crosses exchange borders. Thus, as both the district court and the court of appeals concluded, the plain meaning of the MFJ dictated the standard of review to be applied

to this request, and required the BOCs to meet the "no substantial possibility" standard of Section VIII(C).

AT&T, joined by MCI and other intervenors, objected to this proposed modification on the ground that it extended the reach of the BOCs' monopoly and created substantial risks of anticompetitive harm. Because the BOCs were unable to negate the substantial possibility of anticompetitive harm identified by AT&T, MCI and others, the requested modification was properly denied. Pet. App. at 25a, 43a.

3. The BOCs nonetheless challenge the decisions below on the ground that Section VIII(C) should not apply to the instant request for modification. As the BOCs would have it, a more lenient "public interest" standard, rather than Section VIII(C), should apply because both the BOCs and the United States have agreed that the modification would be in the public interest. *See* Petition for Certiorari in No. 92-848, at 12-15. In essence, and notwithstanding the plain meaning of Section VIII(C), Petitioners contend that whenever the United States and a party restricted by a line-of-business restriction (i.e. a BOC) agree to remove that restriction, this lenient "public interest" standard should apply.

4. The BOCs purport to find support for that argument in a prior opinion of the court of appeals in a related proceeding under the MFJ, the Triennial Review. In *United States v. Western Elec. Co.*, 900 F.2d 283 (D.C. Cir.) (*"Triennial Review"*), *cert. denied*, 111 S. Ct. 283 (1990), the court held that Section VIII(C) dictated the standard of review only for *contested* modifications of the line-of-business restrictions. 900 F.2d at 295, 305-07. The court of appeals concluded that the decree parties intended Section VIII(C) to apply only when a party challenged a proposed removal of a line-of-business restriction. Absent a challenge, the court stated, the parties intended a lenient "public interest"

standard to apply.[2] The appeals court then remanded the case for application of this "public interest" standard to the BOCs' request for removal of the information services restriction unopposed by any decree party.[3]

5. The *Triennial Review* test for deciding what standard of review applies does not help Petitioners in this case, however, because all decree parties did not consent to the BOCs' proposed waiver for common channel signalling. Petitioners have, therefore, attempted to rewrite the *Triennial Review* decision. As Petitioners would have it, Section VIII(C) should apply only when the United States objects to a motion by a "restricted" party—*i.e.* a BOC—to remove a line-of-business restriction. Without so much as a nod to the mutual intent of the parties expressed in the MFJ, Petitioners seek support for this narrow application of the Section VIII(C) standard in general principles of decree administration and separation of powers, and in wholly unsubstantiated predictions as to which outcome below would better advance social welfare.[4]

6. As the court of appeals explained, however, the *Triennial Review* does not support this interpretation of the MFJ. Indeed, in that case, the court held that Section VIII(C) should apply to a BOC petition for removal of the decree's manufacturing restriction, even though the

---

[2] Because neither the United States nor AT&T objected, the court applied that "public interest" standard to evaluate the BOCs' request for removal of the information services restriction. 900 F.2d at 305-07. The court applied the Section VIII(C) standard to evaluate the BOCs' request for removal of the restriction on manufacturing telecommunications equipment because AT&T objected, even though the United States did not. 900 F.2d at 301.

[3] The remand decision is presently pending on appeal before the District of Columbia Circuit.

[4] See also in this regard the brief of the United States Telephone Association submitted in support of the petitions.

United States consented, because AT&T opposed. 900 F.2d at 303-04. At the time, the BOCs did not seek rehearing or otherwise object to this application of Section VIII(C) to a BOC request to remove Section II(D)'s manufacturing restriction. Nor did they file a petition for certiorari challenging the panel's denial of the motion to modify the manufacturing restriction under Section VIII(C). The appeals court in this proceeding also noted that Section VIII(C) had been applied in another MFJ case in which AT&T, but not the United States, had objected to a proposed waiver of a line-of-business restriction. Pet. App. at 13a; *United States v. Western Elec. Co.*, 907 F.2d 1205, 1207-09 & n.3 (D.C. Cir. 1990). Indeed, the panel understandably expressed some surprise that the BOCs would advance this interpretation of Section VIII(C) *for the first time* some ten years after the MFJ was entered. Pet. App. 13a.

REASONS FOR DENYING THE PETITION

1. The questions of whether the MFJ intended to create different standards of review depending on whether a decree party contested a proposed modification of a line-of-business restriction, and, if so, of the proper content of the "public interest" standard for uncontested modifications, should be considered by this Court at the proper time. The instant case does not, however, raise these issues.

The critical question respecting the MFJ standard for modification of the line-of-business restrictions is whether the Section VIII(C) standard covers all modifications, contested or uncontested, or whether that standard applies only if a decree party (BOC, DOJ or AT&T) contests the modification. This is the issue decided in the *Triennial Review* decision. MCI and many other intervenors petitioned for certiorari on that issue in 1990. Because the *Triennial Review* decision resulted in a remand, however, the BOCs and the United States opposed the petition in part on the ground that the case was not

final.[5] As they noted, this Court would have the opportunity to pass on the question at the conclusion of court of appeals review after the remand. Certiorari was denied. 111 S. Ct. 283 (1990). The district court's *Triennial Review* remand decision is presently under submission in the court of appeals. When the appeals court renders its decision, this Court will have the opportunity to consider the issue. It appears likely that, however the court of appeals decides the pending appeal, the issue will be presented to this Court.

The question presented by Petitioners here is entirely derivative of that central issue. Petitioners seek a declaration whether AT&T's objection makes a proposed modification "contested" under Section VIII(C) as interpreted by the *Triennial Review* panel. If, as MCI contends based on the plain meaning of the decree language, Section VIII(C) properly applies to *all* requests to remove line-of-business restrictions, then the issue raised by Petitioners here is moot. Section VIII(C) would apply irrespective of whether any party contested a request to remove a line-of-business restriction. Deciding the question Petitioners raise here thus places the cart before the horse because it assumes the answer to a prior and more important issue on which this Court has not yet definitely spoken. It makes no sense to grant review on this derivative matter, the result of which would necessarily be contingent, when the central issue remains for a future case.[6]

2. Even assuming *arguendo* that the *Triennial Review*'s interpretation of Section VIII(C) is correct, the Petitions for Certiorari in this case raise no question warranting plenary review.

Petitioners claim that the decision below "has serious implications" for antitrust enforcement, administration of

[5] *See* Brief in Opposition of Respondent Regional Bell Operating Companies in No. 90-9, September 7, 1990, at 9, 20-22.

[6] The present case is, moreover, a poor vehicle for addressing the important predicate issue becasue it was not briefed or argued below.

multiparty consent decrees, and the separation of powers. Petition in 92-848, at 11. But that argument for review rests on a desperate caricature of the issues in this case. The court of appeals did not purport to set forth any general principle of law or equity empowering signatories to consent decrees, by virtue of making an objection, to dictate the standard of review to apply to proposed modifications.

Rather, this case raises the specific question whether the particular consent decree into which the parties to this case entered—the MFJ—requires the application of Section VIII(C) when AT&T objects to a proposed modification of a line-of-business restriction. That is, at bottom, a definitional question under the decree because the MFJ itself dictates the standard of review for proposed modifications of the line-of-business restrictions.

As the court of appeals concluded after applying traditional principles of decree construction:

> the question . . . is not how we would fashion the decree if we were writing on a clean slate. The decree is not ambiguous; it gives AT&T the right, as a party to the decree, to assert its objection to the BOCs' proposal and thus to invoke Section VIII(C).

Pet. App. 22a. *See United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975); *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23-24 (1959). Parties to a decree, including the United States, are free to negotiate for a standard to govern proposed future decree modifications. They have done so in the MFJ, and this case involves simply the question of what standards the MFJ embodies.

At bottom, Petitioners' position is simply a variant of an argument that this Court has repeatedly rejected in other cases. Petitioners seek to vindicate what they perceive as "public interest" considerations at the expense of the benefit of the bargain achieved by consent decree

parties. They argue as though interpretation of Section VIII(C) were entirely a matter of judge-made law, that could evolve in response to changing judicial conceptions of what the public interest requires. But this Court has made clear that decree signatories may not be deprived of the benefit of their bargain merely because another decree party, even the United States, subsequently believes the public interest would be better served thereby. *Atlantic Refining*, 360 U.S. at 23-24; *United States v. Armour & Co.*, 402 U.S. at 680-83.

3. In any event, the court of appeals' interpretation of the MFJ does not give AT&T "veto power" over procompetitive changes sought by the BOCs. *See* Petition in 92-848, at 12. Under Section VIII(C), the BOCs can win approval of any line-of-business modification that does not pose a substantial risk of harming competition in the line of business the BOCs seek to enter. This standard provides ample flexibility to accommodate procompetitive innovation and changed market conditions. Indeed, this test was adopted precisely because it afforded significantly more flexibility than did the traditional test for contested modifications set forth in *United States v. Swift & Co.*, 286 U.S. 106 (1932). *See United States v. AT&T*, 552 F. Supp. at 195 (adopting Section VIII(C) to enhance flexibility).

Section VIII(C) simply requires the BOCs to prove that a proposed modification will not bring about the very kinds of anticompetitive bottleneck monopoly abuse that led to the line-of-business restrictions in the first place. Both the district court and the court of appeals concluded that Petitioners failed to meet that standard, and their conclusion should not be reconsidered here. *See Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *United States v. Doe*, 465 U.S. 605 (1984).

4. The consequences for administration of consent decrees in multiparty cases are precisely the opposite of what Petitioners contend. *See* Petition in 92-848, at 11,

16. In the context of a multiparty consent decree, it is hardly surprising that the benefits to some parties depend on the restriction of other parties. Those mutual benefits and burdens are, quite simply, the quid pro quo for agreeing to enter into a decree rather than litigating a case to conclusion. As part of the natural process of accommodation and compromise, decree signatories give up something in order to obtain such benefits. Petitioners argue for a principle that would preclude decree signatories from claiming the benefit of a consent decree whenever a restricted party seeks to modify a restriction on the ground that it is no longer in the "public interest." It is difficult to see why any parties would enter into consent decrees if their ability to claim the benefits of settlement would depend entirely on some future court's view of what the public interest requires.[7]

5. In No. 92-879, Petitioner BellSouth has raised a question implicating separation of powers principles. Plenary review of that question would be inappropriate for several reasons.

a. The question was not raised or decided in the court of appeals. BellSouth concedes in its petition that "[i]n the court of appeals, neither BellSouth nor the other BOCs interposed express constitutional objections" to the application of Section VIII(C). Petition for Certiorari in No. 92-879, at 13. Absent exceptional circumstances not even remotely present here, this Court will not consider issues a party has failed to raise below. *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Youakim v. Miller*, 425 U.S. 231, 234

[7] It is well established that the United States has no entitlement to decree modifications that *increase* the burden on restricted parties over their objection merely because the public interest, or "purpose of the decree" would be better served. *E.g. Atlantic Refining*, 360 U.S. at 23-24. That is because restricted decree parties are entitled to the benefit of the bargain when they entered into the decree.

(1976). That the question presented involves issues of constitutional law does not alter this Court's normal requirement. *See, e.g., Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 n.23 (1989).[8]

b. BellSouth has not presented any substantial separation of powers issue. This case involves the interpretation of a standard of review established by the parties in the decree itself. Petitioners are *not* challenging the "public interest" standard which governs the modification of consent decrees when all parties agree and no other standard is specified by the decree; *nor* are petitioners challenging the *Swift* standard which often applies to modifications of consent decrees when one party opposes the modification and no other standard is specified. The only issue is the application of the "no substantial possibility" standard in Section VIII(C) of this particular consent decree. Thus, this is not a case in which the courts have "arrogated" anything to themselves. They have simply interpreted the intent of the parties to the MFJ, including the United States, as to what standard of review should apply to contested requests for modification.

Indeed, Section VIII(C) limits the judiciary's power as compared to traditional equitable principles, and in-

---

[8] BellSouth rests its entire claim for review on a footnote to the *government's* brief which did no more than note a possible constitutional concern. *See* Br. for United States at 22 n.34. This falls far short of what is required. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the government's footnote does not discuss the issue which BellSouth now raises. The footnote addressed the proper interpretation of the traditional "public interest" standard, not the appropriateness of the court's enforcement of Section VIII(C) based on AT&T's objection. BellSouth seeks to transform the mention of the words "separation of powers," embedded within two sets of parentheses in a footnote in another party's brief, into a license to raise any separation of powers argument that it wishes in this Court.

creases that of the United States, in situations such as the instant case. Under traditional equitable principles, the rigorous *Swift* standard would apply to the BOCs' proposed decree modification. Thus in cases such as this where the United States consents and another party objects, Section VIII(C) provides *more* flexibility and a less rigorous test for modification than would the *Swift* test.

In any event, the issue BellSouth seeks to raise is not of constitutional magnitude. BellSouth attempts to reformulate *United States v. Swift & Co.*, 286 U.S. 106 (1932), as a constitutional decision requiring different rules for consent decree modification when the United States is a party. Petitioners admit, however, that *Swift* does not "address the issue in constitutional terms." Petition in 92-879, at 16.[9] There is simply no warrant for converting questions about the proper standard of review for proposed modifications of consent decrees into a constitutional question of separation of powers, particularly when the courts have done no more than interpret the parties' intent with respect to the proper standard.

None of the structural concerns that raise potential separation of powers problems is present here. The district court did not bestow prosecutorial power on AT&T, or undertake a prosecutorial function itself. *See Morrison v. Olson*, 487 U.S. 654, 695 (1988). Nor does the present case pose any danger that the balance of power between the branches will be disrupted. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). The district court has not acquired any administrative or executive functions which might affect its independence. *See Buckley v. Valeo*, 424 U.S. 1, 123 (1973).

In short, there is no way the judicial branch can impermisisbly undermine the Executive's powers by enforc-

---

[9] Petitioners describe the "constitutional underpinnings" of *Swift* as "unstated, but compelling." Petition in 92-879 at 17.

ing a decree provision to which the United States expressly consented.

CONCLUSION

The Petitions for Certiorari should be denied.

Respectfully submitted.

CHESTER T. KAMIN
MICHAEL H. SALSBURY *
ANTHONY C. EPSTEIN
DONALD B. VERRILLI, JR.
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

* Counsel of Record